IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 16 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RAJENDRAPRASAD GAURISHANKAR - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR RAJESH M AGRAWAL for Appellant(s) : 1,
MR KT DAVE ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 13/03/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under Section 374 of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 8.12.2004 rendered in Special (NDPS) Case No.1 of 2004 by the learned Special Judge (NDPS), District Mehsana by which the appellant ('the accused' for short) has been convicted for commission of the offences punishable under Sections 8 (c) and 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short) and sentenced to suffer RI for ten years and fine of Rs.1,00,000/- i.d, RI for further period of one year.

2. Briefly stated, the prosecution case as disclosed from the complaint as well as unfolded during trial, is as under:

2.1. P.W.7, Ashokkumar Ishwarbhai Patel, P.I. LCB Mehsana, Ex.18, when he was on duty on 9.12.2003 received a secret information from the

informant that a person named Rajendraprasad Gaurishankar Upadhyaya (the accused), originally belonged to Uttar Pradesh, who hired the premises near the buffalo-shed of Patel Babubhai Madhabhai, is engaged in illegal trafficking of drugs i.e., Ganja. He, therefore, recorded the secret information in the register kept for the said purpose and informed the said information to his subordinate police personnels and they were asked to make arrangement of two panchas. The said secret information was conveyed to the panchas as well as other police personnels. Accordingly the preliminary panchnama was prepared.

2.2. After completing the preliminary panchnama, they went in a jeep to the place where the accused was staying. On reaching there, they found the accused. On inquiry, he gave his name as Rajendraprasad Gaurishankar Upadhyaya, belonging to Uttar Pradesh. P.W.7 informed him about the secret information received by him. The

accused was informed that he is a gazetted officer and he is empowered to search the person of the accused. However, if he desires that he shall be searched by another gazetted officer or an Executive Magistrate, he will make arrangement for the same. However, the accused opted that P.W.7 may search him. Accordingly, P.W.7 searched the accused in presence of the panchas and other police personnels. During the search of the person of the accused nothing incriminating was found. However, on search of the premises occupied by him, one galvanized tin box was found and on opening it, two plastic bags were found and from the said two plastic bags, 1 Kg. 450 grams of Ganja was found. Thereafter necessary formalities of seizure, sealing and arrest of the accused were completed and accordingly the second part of the panchnama was prepared.

2.3. A complaint for the aforesaid incident was sent by P.W.7, Ashokkumar Ishwarbhai Patel, to Mehsana City Police Station for registration

which was registered against the accused for commission of the offences punishable under Sections 8 (c) and 20 (b) of the NDPS Act which is on record at Ex.16.

2.4. On registration of the complaint, investigation was put into motion. During the course of investigation, statement of witnesses was recorded, sample of the contraband article ganja which was recovered from the accused was sent to FSL for analysis. On receipt of the analysis report from FSL certifying that the muddamal sent for analysis was ganja and as incriminating evidence was found against the accused, the accused was charge-sheeted before the Special Court (NDPS) Mehsana.

2.5. The learned Special Judge (NDPS), Mehsana to whom the case was made over for trial, framed charge against the accused for commission of the offences punishable under sections 8 (c) and 20 (b) of the NDPS Act. The charge was read over

and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried and thereupon he was put to trial by the learned Special Judge (NDPS), Mehsana in Special NDPS Case No.1 of 2004.

2.6. To prove the culpability of the accused, the prosecution has examined in all 8 witnesses and relied upon their oral testimonies, the details of which have been given in para 3 of the impugned judgment and order.

2.7 In order to prove the charge levelled against the accused, the prosecution has also produced in all 15 documents and relied upon the contents thereof, the details of which have also been narrated in paragraph 3 of the impugned judgment and order.

2.8. After recording of the evidence of the prosecution witnesses was over, the trial Court explained to the accused the circumstances

appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. He stated that he has been falsely implicated in the case. He has not committed any offence. However, he has neither led any evidence nor examined any witness to support his defence.

2.9. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court held that it is proved by the prosecution beyond reasonable doubt that when the accused was intercepted and apprehended, 1 kg. 450 grams of Ganja was recovered from two black coloured plastic bags which were kept in a galvanized tin box from the room hired by him from Patel Babubhai Madhabhai near buffalo-shed. Therefore, complicity of the accused for commission of the offence under the NDPS Act, has been proved and hence the accused has been convicted for commission of the offences punishable under

sections 8 (c) and 20 (b) of the NDPS Act and imposed sentence on him to which reference is made in earlier paragraph of this judgment giving rise to this appeal, at the instance of the accused.

3. Mr. Rajesh M. Agrawal, learned advocate for the accused, at the outset submitted that he does not challenge the order of conviction on merits. However, he challenges the order of sentence. According to him, the contraband article Ganja which was recovered from the accused was less than commercial quantity. He submitted that from the accused Ganja weighing 1 Kg. 450 grams was recovered. However, the trial court imposed the maximum sentence of ten years and, therefore, the sentence imposed on the accused is disproportionate to the guilt of the accused. He also submitted that the accused has undergone more than 3 years and 3 months imprisonment. Therefore, while upholding the conviction, sentence may be reduced to the extent he has undergone and accordingly the appeal may be

allowed qua sentence only.

4. Mr. KT Dave, learned APP for the respondent State of Gujarat, has candidly submitted that it is true that the quantity of ganja recovered from the accused is 1 Kg. 450 grams. As per notification dated 19.10.2001, at Item No.55, small quantity and commercial quantity of Ganja is mentioned as 1000 grams i.e., 1 KG of Ganja is a small quantity whereas 20 Kg of Ganja is a commercial quantity. So far as the accused is concerned, 1 Kg. 450 grams of Ganja was recovered from him. Therefore, he urged that appropriate order giving benefit of rationalized sentencing structure as per the NDPS (Amendment) Act, 2001 may be imposed on him. Therefore he urged to pass appropriate order.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This court has undertaken a complete and comprehensive appreciation of all vital features

of the case and the entire evidence on record which is read and re-read by the learned advocates appearing for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with NDPS Cases, this court has examined the entire evidence on record for itself independently of the trial court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the trial Court has rightly recorded the order of conviction and sentence.

6. Since Mr. Rajesh Agrawal, learned advocate for the accused, has not challenged the order of conviction recorded against the accused on merits, this Court has to examine the sole contention as to whether the trial Court has rightly sentenced the accused person, under Sections 8 (c) and 20(b)(ii)(B) of the NDPS Act i.e., sentenced the accused considering the quantity of the contraband article Ganja

recovered from the accused, weighing 1 Kg. 450 grams.

7. At the outset be it noted that the NDPS Act, 1985 as amended by NDPS (Amendment) Act, 2001 is amended with a view to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. The statement of objects and reasons of the NDPS (Amendment) Act, 2001 is that Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of a minimum ten years rigorous imprisonment which may extend upto twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that

the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalize the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences.

8. There is no dispute that from the accused, quantity of 1 kg. 450 grams of Ganja was recovered, which is admittedly not a commercial quantity and also not a small quantity. As per the notification - SO 1055 (E) dated 19.10.2001, at Serial No.23, the quantity of 1000 grams Ganja is a small quantity whereas quantity of 20 kg. Ganja is a commercial quantity. Therefore, it

cannot be disputed that the quantity of 1 kg. 450 grams of Ganja found from the accused was neither a small quantity nor a commercial quantity. Therefore, trial Court ought to have convicted and sentenced the accused under Section 20(b)(ii) (B) of the NDPS Act taking into consideration the rationalized sentence structure. However, the trial Court, without considering this aspect, has imposed sentence of RI for ten years, which is the maximum sentence, which according to us, is disproportionate to the quantity found from the accused. Recovery of contraband article Ganja weighing from 1.kg. 001 gram upto 19.999 grams would invite punishment under section 20 (b) (ii) (B) of the NDPS Act as the quantity is lesser than the commercial quantity but greater than small quantity and the punishment can be RI for a term which may extend to ten years, and with fine which may extend to one lakh rupees. In instant case, the quantity of contraband article Ganja recovered from the accused is 1 Kg. 450 grams. In these circumstances, the rationalized sentence

structure is required to be considered. Therefore, according to this court, the punishment imposed on the accused is disproportionate to the quantity of contraband article recovered from him. Therefore, according to us, if the accused is sentenced to suffer R.I. for three years and fine of Rs.50,000/- i.d., R.I. for further period of three months, it would meet the ends of justice.

9. Seen in the above context, the appeal deserves to be allowed partly qua sentence only by reducing the sentence as mentioned in the earlier paragraph.

10. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. While upholding the order of conviction recorded against the accused for commission of offences under section 8 (c) and section 20 (b) (ii) (B) of the NDPS Act, the sentence is altered by reducing the same and accordingly the accused is sentenced to suffer RI for 3 years and fine

of Rs.50,000/- and i.d., to undergo RI for further period of three months.

11. Mr. Rajesh Agrawal, learned advocate for the accused, states that since the accused has undergone total period of sentence of more than 3 years and 3 months, appropriate order, directing the jail authorities to release the accused may be passed.

12. Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, on the basis of the jail remark sheet, endorsed by saying that the accused has undergone total period of sentence of 3 years 3 months and 4 days so far.

13. In view of the statement made by Mr. Rajesh Agrawal, learned advocate for the accused, which is endorsed by Mr. K.T. Dave, learned APP for the respondent – State of Gujarat, at the bar and as per the jail remark sheet, since the accused has undergone total period of sentence of 3 years 3 months and 4 days, jail authorities are directed to set the accused at liberty forthwith, if his

presence is not required in connection with any other case.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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